(1)

89-379
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JAMES COONAN and EDNA COONAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Petitioners James Coonan and Edna Coonan were convicted of RICO and related offenses. According to the government's theory, James Coonan was a vicious criminal and "boss" of the "Westies", the name given an ever-changing assortment of street thugs supposedly operating as an association-in-fact RICO enterprise in the "Hell's Kitchen" section of New York City's West Side. The commission by these hoodlums of what have traditionally been charged as State crimes, was made into federal RICO offenses because the "Westies" were said to have "used" the enterprise's chief asset, the reputation for violence supposedly cultivated by Coonan and others, to engage, singly or in varying groups and over a 21-year indictment period, in their criminal activities (murder, loansharking,

extortion, and narcotics). Edna Coonan, said the government, was not merely James Coonan's wife and the mother of their young children, but a conveyer of orders from the "boss" and collector of loans while James Coonan was in prison.

The government's evidence, as well as its theory, depended on the breadth of the RICO statute: It placed crucial reliance on the dubious hearsay of "RICO coconspirators" and on the fruits of a challenged search of the Coonans' home for "RICO evidence". The case also turned on testimony of a paranoid schizophrenic killer, but the jury was not told of the truth-impairing effects of his disorder.

RICO was cited again as the reason for denying Edna Coonan's renewed post-trial motion for a separate trial--denied even though the district judge found devastating prejudice and had "no

question . . . that she could not have been convicted in a trial by herself"--because, as the court understood it, RICO "permit[s] precisely what was done here". The questions presented are:

1. Is it a violation of a defendant's Confrontation and Due Process rights to admit statements in furtherance of a 21-year "overarching RICO conspiracy" under Federal Rule of Evidence 801(d)(2)(E) to prove discrete acts about which the declarants had no apparent personal knowledge and where the government's theory was that such statements could further the RICO conspiracy whether true or not?

2. Did the court below err in upholding RICO convictions where the jury was not instructed to find a connection between the predicate racketeering acts (mostly State law crimes) and the conduct

of the affairs of the enterprise, but rather, was told that it could find an act "related to" the enterprise simply if, in committing it, an alleged wrongdoer availed himself of an enterprise member's reputation for violence -- a "resource" obviously available to anyone even when acting in his own behalf and not conducting any enterprise's affairs?

3. Does the Fourth Amendment allow a search of a home where (a) probable cause to believe that evidence would be found in that location was based solely on the supposed "expert" opinion of an FBI agent that "offenders" keep things in their homes "much like narcotics traffickers", and where (b) the warrant authorized a limitless search for "evidence of violations of 18 U.S.C. § 1962(c)" (the broad RICO law)?

4. Should RICO be read, as the trial court did, to preclude its exercising discretion to order a defendant's separate trial under Rule 14 even where, as here, devastating prejudice, obvious to the court, precluded a fair trial?

5. Were petitioners effectively deprived of their right to present a defense by the refusal to allow testimony explaining the meaning of their chief accuser's diagnosed affliction--paranoid schizophrenia -- a condition which affects not only the ability to be truthful, but the demeanor of the witness, such that normal methods for judging credibility are unavailing?

PARTIES TO THE PROCEEDINGS

Petitioners James Coonan and Edna Coonan were defendants-appellants below, along with codefendants-appellants Thomas Collins, James McElroy, Richard Ritter, Florence Collins, and William Bokun. The United States of America was plaintiff-appellee.

Petitioners' understanding is that defendants-appellants McElroy, Ritter and Bokun intend to file separate petitions for writs of certiorari.

TABLE OF CONTENTS

TABLE OF CONTENTS - Continued

TABLE OF CONTENTS - Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES - Continued

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners James Coonan and Edna Coonan respectfully pray that a writ of certiorari issue to review the summary affirmance of their judgments of conviction by the United States Court of Appeals for the Second Circuit, entered on May 24, 1989, and reaffirmed on July 5, 1989.

OPINIONS BELOW

The summary order of the Court of Appeals is not reported; it is reprinted in the appendix hereto ("App.") at 1a.

JURISDICTION

The summary order of the Court of Appeals was entered on May 24, 1989, App. at 1a; rehearing was denied on July 5, 1989, App. at 14a; an order granting a sixty-day stay of the mandate was entered on July 17, 1989, App. at 16a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

The pertinent provisions of the United States Constitution (Amendments IV, V, and VI), the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq., Federal Rule of Criminal Procedure 14, and Federal Rules

of Evidence 602, 801(d)(2)(E), and 806, are set forth at App. 27a-31a.

STATEMENT OF THE CASE

An indictment returned in March 1987 charged petitioners James Coonan and Edna Coonan and eight codefendants with various crimes allegedly committed as part of "the affairs" of a group of neighborhood hoodlums, labelled "Westies" by the press and government.[1] The defendants supposedly participated in and conspired to participate in the affairs of a "racketeering enterprise" -- the "Westies" -- through 32 predicate acts of racketeering, alleged to have occurred over a 21-year period and including a wide array of often ruthless crimes:

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[1] The name "Westies" was derived from the West Side community in New York City where the defendants were raised and committed crimes. It was conceived by the press; it was not used by the defendants in the commission of crimes.

murders (some entailing posthumous dismemberments), attempted murders, conspiracies to murder, kidnappings, and various conspiracies or acts involving loansharking, extortion, narcotics trafficking, gambling, mail fraud and counterfeiting. Substantive crimes, some corresponding to certain of the predicate acts, were charged as well.

Petitioner James Coonan, the alleged "boss" of the Westies, charged in all counts except those charging gambling and narcotics offenses, and petitioner Edna Coonan, charged in the RICO counts and three counts relating to extortionate credit transactions, were found guilty of the RICO substantive and conspiracy counts. In addition, James Coonan was convicted of seven of the corresponding substantive counts, and one of two tax counts; Edna Coonan was convicted of two

extortionate credit conspiracies, and the same tax count as her husband. James Coonan was sentenced to 75 years in prison and a $1 million fine. Edna Coonan, who remains free on bail, faces a 15-year sentence and a $200,000 fine.[2]

The essence of the defense against the RICO-related counts was that the so-called "Westies" was not a RICO enterprise; the "group" shared no common purposes other than seeking to live through crime; they had no organization other than for each crime as committed, and were not a functional continuing unit. They were but a diverse bunch of thugs who may have associated at various times with James Coonan over the charged 21-year period, but at other times engaged in criminal forays of their own.

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[2] Edna Coonan was granted a stay of the mandate pending this petition. App. at 16a.

Petitioners also defended on the ground that, if there ever was an "enterprise" within the meaning of RICO, it had disintegrated by 1982,[3] and thus no "racketeering activity" occurred within the statute of limitations period.

Edna Coonan further defended on the ground that, though evidence may have shown that she received money from others while her husband was in jail, it did not show that she agreed to participate in loansharking, nor, indeed, that she knew of the extortionate nature of any loan, or knew of or aided any "enterprise".

The issues raised herein go to the heart of these defenses.

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[3] James Coonan was in jail in 1979-84; not one live witness testified to any criminal activity with him during or after that period. To the contrary, they complained that he was not "with them" any longer after he went to jail and was released: indeed, some of his codefendants plotted to kill him upon his release, largely because they were getting no money from him.

Crucial to the proof of the RICO violations and related predicate offenses -- indeed, the only evidence of an ongoing "enterprise" or petitioners' "association" with it within the limitations period -- was "coconspirator" hearsay. And despite the government's own evidence that undercut the reliability of this hearsay, these untrustworthy out-of-court statements were admitted across the board against all defendants for their truth on the theory that all defendants were members of the "overarching RICO conspiracy" -- a concept far afield from the traditional conspiracy rationales on which Rule 801(d)(2)(E) was premised.

Thus, despite extensive government surveillance, wiretaps, and a slew of cooperating witnesses, not a single live witness testified about observing criminal conduct by James Coonan after

his release from jail in 1984. The only evidence of his supposed involvement in each post-1982 predicate came from unexaminable out-of-court declarants who used or allegedly used James Coonan's name in threatening or boasting of crimes, or in reporting about their commission (or gossiping about others' commission) of those predicates.

For example, James Coonan's supposed involvement in a post-limitations extortion of a union official was proved by the testimony of Francis "Mickey" Featherstone, a diagnosed paranoid schizophrenic and self-styled "number two Westie" (who hated the Coonans because they did not give his wife money while he was in jail). It was only Featherstone's claim -- that he heard fugitive codefendant and alleged RICO conspirator Kevin Kelly use Coonan's name to threaten

the union official -- that tied James Coonan to the crime. Likewise, Coonan's alleged complicity in an assault on John O'Connor in 1986 was proven by testimony of an undercover drug agent, who reported statements made by codefendant James McElroy's girlfriend, Fran Mostyn, whom the government claimed was one of many (uncharged) members of the "RICO conspiracy" only because she assisted her boyfriend in a predicate narcotics conspiracy some six months after the O'Connor assault. Though Mostyn was not alleged as a conspirator to the O'Connor assault, nor even in the alleged RICO conspiracy at that time, her later ruminations about what Coonan supposedly did -- about which nothing showed her personal knowledge -- were nonetheless admitted for their truth because of the invocation of the RICO statute and the

dangerous and erroneous assumption that, under RICO, "anything goes".

There was, in sum, nothing but rank gossip to prove many predicates, the "enterprise", and the Coonans' supposed membership in it during the limitations period. Nor could this hearsay be deemed "presumptively" reliable: the government's own theory that "Westies" would "cultivate" a reputation for violence, and would falsely use James Coonan's name for their own personal ends, showed it to be untrustworthy.

Indeed, the evidence showed that distortions and wrongful accusations occurred as a matter of course among the criminals of Manhattan's West Side. For example, alleged "Westie" Ray Steen acknowledged (after cooperating with the police in 1979) that his claims of having committed crimes with James Coonan had

been false "boasting" to aggrandize himself. So too, Mickey Featherstone, the schizophrenic enforcer, was shown to have previously "confessed" to many crimes, some supposedly with Coonan, which he denied committing when he testified (and which Coonan did not commit). And at least one charged predicate (the Krueger kidnapping) occurred for the very reason that Krueger had used Coonan's name without permission, in collecting Krueger's own loansharking debts.

The government indeed depended on the motivation of the so-called "Westies" not to be truthful. As it contended in its brief to the Court of Appeals (Gov. Brief ("GB") at 8), the "Westies' reputation for extreme violence" was "the most valuable asset" of the enterprise. This reputation, the government argued, was more important than the truth -- a

resource that was "carefully cultivated."

Yet, despite the unreliable quality of such hearsay by the government's own theory, and the absence of independent corroboration to promote any notion that the statements could be trustworthy,[4] the courts below refused to consider unreliability as a reason to preclude the evidence. Rather, upon the government's invocation of this Court's decision in Bourjaily v. United States, 483 U.S. 171 (1987), holding that "coconspirator hearsay" satisfying Rule 801(d)(2)(E) overcomes any presumed unreliability of out-of-court statements, the courts below

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[4] In its brief below (GB at 77-78), the government struggled to divine corroboration. One preposterous argument was that a prison log showing that homicide victim Leone visited Coonan in prison shortly before Leone's death corroborated the charge that Coonan ordered the murder of Leone. Obviously, however, Leone, a neighborhood friend and associate of Coonan, did not visit Coonan to plan his own murder.

upheld the unlimited use of this manifestly unreliable hearsay without requiring any demonstration of its trustworthiness.

Petitioners challenged the mechanical invocation of Rule 801(d)(2)(E) as a violation of both the Confrontation and Due Process Clauses. They argued that Bourjaily did not, and would not, sanction the use of unreliable evidence, and that to have allowed the jury to rely on such uncross-examinable declarations for their truth, on matters about which declarants had neither a basis to know nor a reason to be truthful, not only deprived them of critical constitutional protections, but seriously undermined the integrity of the factfinding process.

Petitioners further asserted that alleged membership in an "overarching RICO conspiracy" was no basis to permit

statements to be used to prove discrete predicate crimes: use of a multifaceted and long-running "overarching RICO conspiracy" does not comport with the traditional agency rationale underlying the common law rules for coconspirator hearsay, and "membership" in a diverse "RICO enterprise" does not and cannot provide sufficient assurances of trustworthiness for statements about unshared predicate acts: How could some criminal "associated" with James Coonan only in the late 1970's truly know anything about a supposed murder committed in 1965, except through gossip and rumor? Yet such statements were admitted as if the truth.

In response, the government argued that Bourjaily permits any coconspirator statement to be considered for the truth of every assertion in it, as long as Rule

801(d)(2)(E)'s "in the course of" and "in furtherance" requirements are satisfied; Bourjaily, it claimed, excuses inquiry into reliability regardless of the untrustworthy quality of the hearsay.

Nor did the government see any problem with statements made by persons not alleged to have been participants in the discrete predicate offenses, who had no apparent or demonstrable personal knowledge about the events of which they spoke. Rather, the government contended, because demonstration of a declarant's personal knowledge is not explicitly required under Rule 801(d)(2)(E), the need for an inference of personal knowledge (as exists for all witnesses, Fed.R.Evid. 602) is dispensable.

Despite the government's concession that the "personal knowledge" issue was one of first impression in the Second

Circuit, the Court of Appeals did not comment on it. Nor did the court remark on the demonstrated unreliability of this coconspirator hearsay or the rote application of Rule 801(d)(2)(E) in a RICO conspiracy context. Rather, in a sparse summary order, it merely termed these and other important and recurring issues "without merit". App. at 13a.

The Court of Appeals did comment, however, on the challenged jury charge on the RICO offenses: The court accepted the government's theory that mere use of the "Westies'" reputation for violence in the commission of a predicate crime could itself establish RICO's required nexus between criminal acts and an enterprise.

Purportedly relying on United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981), the district court had charged that RICO

"relatedness" may be shown in two ways:

> either the act was committed . . . for the knowing and willful purpose of furthering the enterprise, or, in committing it, he knowingly and willfully availed himself of the resources of the enterprise. In many instances it is the government's contention that the resource of which the defendant availed himself was the reputation for violence that the government claims the enterprise had established [Court of Appeals Joint Appendix ("CA App. JA") at A-493].

Petitioners argued that this instruction did not require an actual connection between the predicate acts and the way the defendant was conducting the affairs of the enterprise; unlike the charge in Scotto, the charge here required no finding that a defendant's acts, to the extent that they did not "further" an enterprise's affairs, were able to be committed, to use Scotto's charge language omitted here, "solely by virtue" of his position in the enterprise. Thus, once the jury found

that James Coonan or anyone else allegedly associated with the enterprise had a reputation for violence,[5] it could find an act related to that enterprise (and in turn "construct" an ongoing enterprise) simply because a defendant had exploited that reputation in committing a crime. And this was so even if the exploitation was for personal ends, did not benefit the "enterprise", and though the defendant's access to that "resource" had nothing to do with his position in the enterprise: any hood on the street could invoke the Coonan name in a fight and the act could be found enterprise-related. The charge thus required no finding that the defendant

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[5] We say "anyone associated with the enterprise" rather than "the enterprise", because the "enterprise" itself had no name or official membership. It consisted of whomever the authorities deemed a "member" after the fact.

was conducting the affairs of the enterprise through the charged pattern of predicate activities, as required by RICO, 18 U.S.C. § 1962(c).

The Court of Appeals rejected the challenge to the instruction. Misconceiving the issue as merely whether Scotto (in which the "enterprise" was a union) should be limited to cases involving legitimate as opposed to illegitimate enterprises, the court held that there was no reason to limit the Scotto test to legitimate enterprises. App. at 12a-13a. In so holding, the court condoned applications of RICO based on use of an ethereal "resource" like reputation, available to anyone for the taking to commit criminal activity unrelated to any enterprise.

As for the evidence against Edna Coonan, the most crucial was the

testimony of diagnosed paranoid schizophrenic Featherstone, whose claim that he no longer suffered from that condition was not permitted to be fairly tested by the defense. The jury was told nothing about this disorder beyond its mere name, because the trial judge precluded a qualified expert's testimony about its meaning and incurability.

After conviction, Mrs. Coonan also renewed her severance motion, urging that the jury was unable to view the evidence against her independently, given the incurably prejudicial evidence of her husband's violence.[6] The trial judge denied a new trial for Mrs. Coonan even though he found devastating prejudice and had "no question . . . that she could not

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[6] The prosecutor repeatedly described James Coonan as "vicious", and even burst into tears while pointing at him and calling him a "damn butcher" during summation.

have been convicted in a trial by herself assuming the highly improbable assumption that anyone would try to try such a trial" (CA App. JA. at A-639). The denial was based on the judge's apparent view that he had no discretion to award severance where RICO was charged, in that, as he understood it, Congress' "purpose" in "enacting the [RICO] statute [was] to permit precisely what was done here." (Id.) The summary affirmance did not speak to the issue.

Nor did the Court of Appeals address the challenge to the use of evidence derived from an extensive and limitless search of the Coonans' home pursuant to a 1986 warrant.[7] Petitioners moved to

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[7] The fruits of this search were the sole support for the tax conspiracy count of which both Coonans were convicted (both were acquitted of a substantive tax count). The fruits also underlay government claims about the Coonans'

(continued...)

suppress the fruits on the grounds, inter alia, that the warrant was not even arguably supported by probable cause and lacked all semblance of particularity to limit seizing agents' discretion. The Second Circuit rejected both grounds without comment, though the implications for the Fourth Amendment are startling.

First, the affidavits supporting the warrant contained no information that anything was in the Coonans' home. Rather, probable cause to believe that evidence would be found in their home was based only on an FBI agent's generality that "narcotics traffickers" (an offense with which neither James nor Edna Coonan were implicated in the affidavit) often

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[7](...continued)
supposed "wealth", and in turn led to arguments that this wealth proved that James Coonan was the "boss" of the charged "enterprise" and that Edna Coonan was his deputy.

keep records in their homes, and the further purported "expert opinion" of another FBI agent that other "offenders" generally keep records "in somewhat the same manner" as traffickers (CA App. JA at A-1326). The agents' observation to the effect that "people keep things in their homes", of course, is hardly an "opinion" requiring special "expertise"; nor is it probable cause in itself, though it was accepted as such.

The warrant's authorizing provisions were no better. The warrant permitted agents to search not only for "evidence of loansharking and extortion records" (none, by the way, were found), but also, to use the warrant's words, for "other evidence of violations of 18 U.S.C. § 1962(c) [RICO] (including predicate acts of loansharking and extortion) and fruits thereof" (CA App. JA at A-1316) -- a

virtually limitless category. The kinds of evidence, the nature of any RICO enterprise, and specific predicate acts to which the evidence purportedly would relate, were nowhere particularized.

The government's position was that, because the affidavits in support of the warrant showed that James Coonan "lived a life of crime" and, presumably, all of his crimes could be fashioned as RICO predicates, it was proper for the agents executing this warrant to take (to use the government's words) "all records" which could be "possible evidence" from the Coonans' home (GB at 143-44). This effectively meant "everything".

And though no magistrate was ever asked to authorize a seizure of "everything", virtually "everything" is precisely what the agents took. They carried out cartons upon cartons of

documents -- indeed, they took the Coonans' plastic and metal cartons themselves (i.e., file drawers), even when filled with privileged attorney-client documents marked "confidential", or with other personal material (including innocuous items like photographs, the children's class lists and baptismal records, and even all of the unpaid current household bills), without bothering to limit the seizure at all -- for the government's later leisurely perusal.

The Court of Appeals included these serious Fourth Amendment issues with the group it claimed had been "carefully considered" but apparently so "without merit" that no discussion at all was deemed necessary. App. at 13a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant The Writ To Enunciate Standards For The Admissibility Of Coconspirator Statements In The Context Of A Non-Traditional RICO Conspiracy, To Right A Misapplication Of Its Decision In Bourjaily, And To Resolve A Conflict In The Circuits Concerning Statements Of Alleged "RICO Coconspirators" Concerning Ventures In Which They Had No Part

Two years ago this Court held, in Bourjaily v. United States, 483 U.S. 171 (1987), that, because the coconspirator "exception" to the hearsay rule is steeped in our jurisprudence, hearsay that satisfies the requirements of Rule 801(d)(2)(E) (statements made in the course of and in furtherance of a conspiracy) overcomes the presumptive unreliability of out-of-court statements and obviates a Confrontation Clause objection to admission for its truth. Here, the courts below used Bourjaily in a way that could not have been intended,

invoking RICO's breadth as the reason. Despite the demonstrated unreliability of out-of-court statements (a circumstance not present in Bourjaily) about conduct of which no basis for the declarant's personal knowledge was even implied, statements were admitted for their truth -- skewing the factfinding process.

Bourjaily involved a "traditional" conspiracy, just as Rule 801(d)(2)(E) was premised on the common law hearsay exception for "traditional" coconspirator statements. This case, by contrast, involved an extraordinary "conspiracy" unknown at common law -- an "enterprise" conspiracy. Such a "conspiracy" is so unconventional that it cannot even be prosecuted as a traditional conspiracy, as was stated in a seminal RICO case, United States v. Elliot, 571 F.2d 880, 900-03 (5th Cir.), cert. denied, 439 U.S.

953 (1978). Rather, said Elliot, RICO "displaced" precepts "traditionally applied to concerted criminal activity" with a "legislative innovation" -- an "enterprise conspiracy".

Because neither RICO law nor RICO conspiracies are "firmly rooted" in our jurisprudence (unlike the conspiracy considered in Bourjaily), perfunctory reliance on rules determining the admissibility of statements made by "traditional" coconspirators, when "RICO coconspirator" statements are at issue, is inappropriate and, as in this case, permits unconstitutionally unreliable and untestable evidence. Given RICO's zealous application around the country, not only by prosecutors but civil litigants as well, consideration of standards for admission of coconspirator hearsay in the RICO context is of tremendous importance

and should be clarified by this Court.

In Bourjaily, the Court was confident that satisfaction of Rule 801(d)(2)(E)'s requirements would assure that hearsay would possess adequate indicia of reliability to satisfy the Confrontation Clause; that is why an independent inquiry into reliability was not required. The Court did not say, as it would not, that when unreliability is shown, as it was here, it should be ignored; but that is how the Second Circuit read it. Moreover, Bourjaily said nothing about a "RICO conspiracy", in which satisfaction of Rule 801(d)(2)(E) does not assure reliability.

Hearsay statements in furtherance of this RICO conspiracy were more than "presumptively unreliable" (the condition Bourjaily held overcome by satisfaction of the traditional hearsay exception):

the government's own theory was that individuals deemed members of the "Westies" enterprise often made untrue statements in which they falsely boasted of past exploits or invoked reputations of others (true or not) to facilitate their commission of personal crimes.

Thus, to use but a few examples, when Kevin Kelly used the name "Coonan" in threatening a union official to make payments to Kelly, under the government's theory and court's charge, Kelly would have been conducting the affairs of the "Westies" even if he only used Coonan's name and reputation to intimidate for personal gain, and even though Coonan had nothing to do with the threat. And the statement would be admitted for its truth, to prove Coonan's complicity, whether true or not, because the statement also "cultivated" the

enterprise "asset" of reputation.

Similarly, while Westie-girlfriend Fran Mostyn's statements during drug sale negotiations with an undercover officer, linking Coonan's name with an assault of John O'Connor (carried out by Mostyn's boyfriend), may have furthered her narcotics deal (and possibly the RICO enterprise) by impressing the undercover agent, they too would have done so whether true or false as to Coonan. Yet, the government relied on these statements for their truth to prove James Coonan's complicity in the union extortion and O'Connor predicates (and related substantive counts), and did so without being required to rebut their manifest unreliability through independent corroborative evidence or otherwise.

When crucial but unreliable statements are admitted without the opportunity to

cross-examine, it is a Confrontation and Due Process violation of the worst kind--not a matter for mechanical application of evidence rules. This Court should grant the writ to say that Bourjaily cannot be read to sanction the use of unreliable evidence.[8]

Nor can Bourjaily's rationale be automatically applied to "RICO conspiracies" -- the other manner in which it was misapplied. "Membership" in

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[8] Bourjaily itself, citing Ohio v. Roberts, 448 U.S. 56 (1980), implicitly recognized the need for a reliability inquiry in some cases under the standards announced in Dutton v. Evans, 400 U.S. 74 (1970). Dutton recognized that only reliable out-of-court statements that are neither "crucial" to the conviction nor devastatingly prejudicial to the defendant, will pass muster under the Confrontation Clause. 400 U.S. at 87. Accord, United States v. Stratton, 779 F.2d 820, 830 (2d Cir. 1985), cert. denied, 476 U.S. 1172 (1986). See also United States v. Koskerides, No. 88-1417, slip op. 3843, 3856 (2d Cir. June 14, 1989) ("a higher standard of reliability is imposed if the hearsay statements were 'crucial' to the government's case"). Many statements were undoubtedly crucial and devastating here.

a wide-ranging RICO conspiracy does not provide any guarantee of reliability, as might membership in a traditional conspiracy. This 21-year RICO conspiracy allegedly consisted of a broad array of sub-conspiratorial predicates. It had a multitude of goals and changing members, not all of whom shared the same objectives. By the time many of the post-1982 statements were made, many "members" had not even seen each other for years.

This "conspiracy" is thus far afield from common law conspiracy principles--indeed, it could not even be prosecuted under traditional conspiracy law. Elliot, supra, 571 F.2d at 902. Certainly, any vitality enjoyed by the agency theory that underlies the coconspirator hearsay exception in the context of a single and simple conspiracy with discrete goals and a relatively limited time frame (as in

Bourjaily) is completely vitiated when applied to a diversified 21-year RICO enterprise conspiracy.[9] Where disparate "sub-conspiracies" make up a supposed "RICO conspiracy", there is no reason to believe that one "RICO conspirator" knows anything of the goals, much less the workings, of all predicate conduct, nor that he has any basis to speak reliably.

An analogy demonstrates this point. Suppose a Kraft Cheese employee speaks about the doings of a Marlboro Cigarette employee. Both ultimately work for the diverse Philip Morris enterprise. This is hardly a reason to suggest, however, that the Kraft employee has any basis to truly know about cigarette-making or who may be

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[9] As the Advisory Committee warned, "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." Fed. R. Evid. 801(d)(2)(E) Advisory Committee note.

or was involved in that venture. The plain fact is that cheese and cigarettes are not the same, even if the same "overarching enterprise" is served.

The same principles should limit the use of statements of "overarching RICO conspirators." An extorter, for example, may gossip to an informant about who he heard was a codefendant's past murder victim; but even if it serves the same "enterprise" (e.g., under the all-too-loose rationale currently invoked to admit statements -- that a conspirator's "briefing" of another is in the course and furtherance of a conspiracy), there is no reason to think that the speaker knows any more than any man on the street. Indeed, another Court of Appeals, in a decision conflicting with the decision below, recognized this point by limiting the use of RICO conspirators'

statements. United States v. Angiulo, 847 F.2d 956, 971 (1st Cir. 1988) (joint membership in a RICO conspiracy is not a sufficient basis to admit statements in furtherance of one predicate to prove a defendant's commission of a separate predicate). This Court should grant the writ to resolve this conflict and appropriately limit Bourjaily to its common law bases.

The Angiulo decision's recognition of the need to scrutinize "RICO conspiracy" statements further shows the error of the ruling below rejecting (without comment) the argument (a first-impression one in the circuit) that there must at least be some showing of a RICO declarant's personal knowledge before the hearsay is admitted. This is required not only explicitly under Rule 602, Fed. R. Evid. (quoted at App. 30a), but by the Due

Process and Confrontation Clauses, which are meant to assure that a defendant will not be convicted on the basis of gossip or falsehoods.

If, as the Second Circuit itself recognized in United States v. Lang, 589 F.2d 92, 98 (2d Cir. 1978), the hearsay exceptions (Rules 803 and 804) do not dispense with the need to show an out-of-court declarant's personal knowledge (per Rule 602), there is every reason to require a similar showing pursuant to Rule 602 when the out-of-court statement is offered under Rule 801(d)(2)(E).[10] Someone should be shown to have knowledge

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[10] Indeed, Rule 806, Fed. R. Evid. (quoted at App. 31a), which expressly authorizes credibility attacks against both a "hearsay declarant" (Rules 803 and 804) and a declarant under Rule 801(d)(2)(E), shows that the rule of personal knowledge should be no different for one type of declarant than for the other — as it is required of in-court witnesses under Rule 602. There is the same need for accuracy in the factfinding process in all cases.

before a defendant is convicted (or facts are proven) by out-of-court statements, as is required for in-court testimony as a fundamental guarantee.

Indeed, this Court has so recognized in other contexts.[11] And especially in a RICO context, where a "RICO conspirator" cannot be presumed to have knowledge, the requirement is crucial.[12] For the court

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[11] Dutton v. Evans, 400 U.S. 74 (1974), considered hearsay under a State evidentiary rule which, like RICO, went far beyond common law notions (in that case, a rule admitting statements made after termination of a conspiracy). This Court looked for indications of the declarant's personal knowledge as one of the necessary indicia of trustworthiness. The Court recognized that, without such knowledge, the use of the out-of-court statement would violate a defendant's Confrontation rights, at least when the hearsay was "crucial" to the conviction, 400 U.S. at 87-88, as it was here.

[12] Many courts have looked for personal knowledge before holding out-of-court statements constitutionally admissible against a defendant as "traditional" coconspirator declarations. E.g., United States v. O'Connor, 737 F.2d 814, 820 (9th Cir. 1984) (noting declarant's personal knowledge and other indications that the hearsay

(continued...)

below to have sanctioned the use of statements where personal knowledge was nowhere even inferable is to depart so radically from basic Due Process and Confrontation Clause protections that this Court's guidance is required. It should grant the writ to resolve the conflict between the decision below and that in United States v. Angiulo, supra, and to say that Bourjaily cannot be invoked to sanction the admission of untrustworthy evidence.

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[12](...continued)
was trustworthy), cert. denied, 469 U.S. 1218 (1985); United States v. Ammar, 714 F.2d 238, 256 (3d Cir. 1983) (holding that, though personal knowledge is not an explicit foundation requirement under Rule 801(d)(2)(E), it is nonetheless a "significant" factor in determining whether coconspirator hearsay is reliable enough to satisfy constitutional demands), cert. denied, 464 U.S. 910 (1983). Cf. French American Banking v. Flota Mercante Grancolombiana, 639 F.Supp. 1421, 1426 (S.D.N.Y. 1987) (holding hearsay inadmissible when circumstantial guarantees of trustworthiness such as declarant's personal knowledge, were not present, citing United States v. Stratton, 779 F.2d 820, 829 (2d Cir. 1985)).

II. This Court Should Grant The Writ To Clarify The Required Nexus Between An "Enterprise" And A "Pattern Of Racketeering" Under Section 1962(c)

The most frequently-used RICO provision, § 1962(c), makes it unlawful for any person employed by or associated with an enterprise to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering. The circuits have not agreed on the necessary relationship between the defendant's participation in the enterprise's affairs and his commission of the predicate racketeering activity. Some focus only on the effect of the racketeering activity on the enterprise;[13] others concentrate as well

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[13] E.g., United States v. Provenzano, 688 F.2d 194, 200 (3d Cir.), cert denied, 459 U.S. 1071 (1982); United States v. Hartley, 678 F.2d 961, 991 (11th Cir. 1982), cert denied, 459 U.S. 1170 (1983); United States v. Kovic, 684 F.2d 512, 516 (7th Cir.), cert denied, 459 U.S. 972 (1982).

on the opportunity to commit the racketeering acts that is permitted by the defendant's role in the enterprise.[14] This case, which required the jury to find only that, in committing the racketeering activity, a defendant "availed himself . . . of the reputation for violence that the government claims the enterprise had established", departs from prior cases and, more importantly, from the statute's requirements.

Previously, the Second Circuit law was that a sufficient nexus between the affairs of the enterprise and the predicate offenses exists if

> (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement or control over the

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[14] E.g., United States v. Cauble, 706 F.2d 1322, 1332 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Scotto, 641 F.2d 47, 54 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981).

> affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise.

United States v. Scotto, supra, 641 F.2d at 54 (emphasis added). In this case, the court eliminated the "solely by virtue of" requirement, substituting:

> [the actor] knowingly and willfully availed himself of the resources of the enterprise. . . . [I]t is the government's contention that the resource of which the defendant availed himself was the reputation for violence that the government claims the enterprise . . . established.

This charge permitted convictions which do not satisfy § 1962(c).

Unlike Scotto, which involved a union "enterprise", this "enterprise" was nothing but the "personnel" itself;[15] indeed, it had no name at the time of the

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[15] The defense argued that this was no RICO enterprise, but rather, as one witness described it, "a bunch of guys from the avenue" (Trial Transcript at 392).

commission of the predicate offenses. There was no evidence that any defendant who "used" the resource of the enterprise -- its reputation for violence -- said, for example, "Pay your debt or 'us Westies' will harm you." Rather, as the prosecution stressed, certain individuals who committed West Side street crimes had a reputation for violence, and it was their personal names that were used. The scenario might have gone: "Pay your debt or Jimmy Coonan will harm you" (whether Coonan was involved or not); or, in the case of James Coonan himself, simply: "Pay your debt [or else]."

The government's proof was that at least some individuals -- like victim Krueger, allegedly kidnapped because he helped himself to James Coonan's name without permission to aid in the collection of Krueger's own, personal

loans -- engaged in precisely this kind of "name-dropping", even though not acting for or in relationship to any enterprise, and not a "member" of it. Such "racketeering activity" is not "in the conduct of the enterprise's affairs."

The trial court's charge, by allowing the jury to consider use of a "resource" so freely available to anyone, and to conclude that the "use" of that "resource" created the necessary nexus between the act and the enterprise even if the actor did not further the enterprise, effectively eliminated the requirement that the pattern of racketeering activity be connected to the way that the defendant was conducting the affairs of the enterprise. Indeed, it permitted the very conclusion that an enterprise existed merely because independent street hoods in the same

neighborhood touted their powers by boasting of vicious associations.

This case represents an expansive use of the RICO statute. With the wave of a RICO wand and the invocation of abstractions like "reputations for violence", the government converted what are essentially State crimes, concededly serious (but punishable by the States), into federal offenses. The erroneous charge obviated any connection between the crimes and the affairs of an enterprise, the central concern of Congress in § 1962(c). With RICO's continuing expansive use, this Court should grant certiorari to insure that the intent of Congress, and not the imagination of zealous prosecutors or civil litigants, controls in RICO matters.

III. This Court Should Grant The Writ Because Approval Of The Search Of A Home Solely On The Basis Of An Agent's "Opinion" That People Keep Things In Their Homes Eviscerates The Fourth Amendment's Probable Cause Requirement, And Because Approval Of A Warrant To Search For "Evidence Of RICO Violations" Conflicts With Decisions In Other Circuits And Allows Unconstitutionally Unlimited General Searches

The Coonans' home was invaded and virtually every document seized on the basis of a warrant containing no cause to believe any evidence would be in that location. All that supported probable cause was the "opinion" of an FBI agent, engaged in his "competitive" effort of "ferreting out crime", Johnson v. United States, 333 U.S. 10, 14 (1948), to the effect that people ("offenders") keep things in their homes. Nor was there limitation on the authorized seizures.

No witnesses were reported to have

seen particular evidence of loansharking, nor anything else for that matter, in or around the Coonan home. Rather, "expert opinion" about where offenders "often" keep records and things was the sole basis to search the home.

Even were there a basis to accept "expert" evidence in this context--though it takes no expertise to know that people keep things in their homes and thus no opinion evidence should even have been accepted -- it is nothing less than shocking for a court to sustain a warrant to search a home premised totally on the "opinion" of a police officer about where people (including "offenders") generally keep things. Probable cause must mean more than this: The Constitution so requires, and this Court should grant the writ and so state. But even if we are wrong -- if searches are to be permitted

on the showing made here -- this Court should make this dramatic ruling explicitly, for it would overrule earlier decisions which have properly required more than police "opinion" about what people often keep in their homes.[16] The Court of Appeals' departure from the Fourth Amendment is a dangerous precedent that should not be permitted to stand.[17]

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[16] In United States v. Harris, 403 U.S. 573, 584 (1971), for example, this Court noted that "the issue in warrant proceedings . . . is probable cause for believing the occurrence of a crime and the secreting of evidence in a specific premises". [Emphasis added]. Accord, United States v. Travisano, 724 F.2d 341, 345 (2d Cir. 1983) (factual showing that "evidence . . . is located at the residence" is required in addition to facts establishing commission of a crime).

[17] Indeed, the Second Circuit itself, prior to this case, required at least some evidence independent of "expert opinion" before allowing an invasion of a suspected offender's home. E.g., United States v. Benevento, 836 F.2d 60, 71 (2d Cir. 1987), cert. denied, 108 S.Ct. 2035 (1988); United States v. Fama, 758 F.2d 834, 836 (2d Cir. 1987); United States v. Young, 745 F.2d 733, 758 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985). These cases involved narcotics

(continued...)

The Second Circuit also improperly approved the "catch-all" reference to the extraordinarily broad RICO statute to describe items (to quote the warrant: "evidence of violations of § 1962(c)") which agents could search for and seize in the Coonans' home. This ruling not only is at odds with the Fourth Amendment's particularity requirement, but it conflicts with holdings of other circuits, cited in the footnote below, that condemn "statutory descriptions" in search warrants for their failure to

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[17](...continued)
agents' opinions, which have gained some judicial recognition as deserving consideration in determining probable cause and for other reasons — dubious rulings which, since not carefully limited, have led to cases such as this. Even if it is sensible to accept opinions of long-time investigators where, for example, they can say that an apartment with certain characteristics is used as a "stash pad" or that ledger sheets with certain configurations or "codes" may be narcotics records, it takes no "expertise" to say that people keep things in their houses.

limit executing agents' discretion.[18]

Here, reference to the RICO statute effectively authorized, and the executing agents used it to conduct, a limitless search of the Coonans' home. In its brief below, however, the government, like the reviewing court, did not even address the warrant's reference to the RICO statute. Its only response to the defendants' lack of particularity argument was that, after authorizing a search for specific and general loansharking-related evidence,

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[18] E.g., United States v. Leary, 846 F.2d 592, 601 (10th Cir. 1988) (warrant for documents relating to violations of federal export laws authorized a "general search . . . overbroad on its face"); Rickert v. Sweeney, 813 F.2d 907, 909 (8th Cir. 1987) (insufficient limitation where warrant referred only to general conspiracy state and general tax evasion statute); United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982) (warrant for business papers that evidenced "violation of general tax evasion statute, 26 U.S.C. § 7201" was insufficiently limited); Roche v. United States, 614 F.2d 6, 7 (1st Cir. 1980) (warrant for evidence of 18 U.S.C. § 1341 violations contained "no limitation at all" on agent's discretion).

the RICO reference added only superfluous "boilerplate" (GB at 138).

Leave to search for "evidence of violations of 18 U.S.C. § 1962(c)" and "fruits thereof" is anything but innocuous and superfluous. A warrant authorizing a search for any evidence of any RICO violation gives the agents carte blanche, as shown by the indictment ultimately returned in this case. It included acts occurring over a 21-year period and as diverse as murder, kidnapping, mail fraud and narcotics violations, as well as extortion and loansharking. It identified an "association-in-fact" enterprise composed of a vacillating group of individuals, and alleged that the enterprise was engaged in an activity as boundless as "enhancing its reputation for violence." An agent armed with a warrant authorizing

a search for something as open-ended as "other evidence of violations of 18 U.S.C. § 1962(c)" would have no more reason to limit his search, as the government suggested below, than the prosecutors apparently had to limit the RICO counts to predicate acts of loansharking; and a magistrate who authorizes such a search shirks his duty.

An agent with this warrant would, as happened here, be free to conduct a general exploratory search of the Coonan home and seize "all their records" as "possible evidence" of what was believed to be their "lifetime of crime" (GB at 143). This is precisely the kind of "general, exploratory rummaging in a person's belongings" against which the particularity requirement of the Fourth

Amendment was meant to guard.[19]

Almost any crime can be transformed into a RICO offense. If this is Congress's wish, this Court should at least ensure that Fourth Amendment and other Constitutional protections are not trampled in the course of RICO's incessant march. It should grant the petition and hold that a warrant's

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[19] The fact that such an unlimited search of the Coonan home was undertaken by executing agents, who took and retained even confidential attorney-client privileged materials, obviates the good faith exception to the exclusionary rule. United States v. Leon, 468 U.S. 897 (1984). Leon itself approved a good faith exception only in the one circumstance before the Court — i.e., when evidence was obtained "by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." 468 U.S. at 900. The Leon Court recognized, however, that the good faith exception cannot always be applied. For reasons well-stated in United States v. Leary, 846 F.2d 592, 607-10 (10th Cir. 1988) and cases cited therein, Leon has no applicability where particularity was lacking. Nor should it apply where a magistrate "rubber-stamped" a warrant based only on an FBI agent's opinion as to probable cause.

reference to RICO cannot substitute for particularization.

IV. This Court Should Grant The Writ To Ensure That RICO Does Not Cause The Abdication of Discretion To Grant Separate Trials For Prejudicial Joinder

Edna Coonan was forced to face trial at the side of her husband, against whom mountains of evidence of monstrously violent behavior were presented. Her renewed motion for a new trial was denied by a trial judge who expressed the real danger of RICO: regardless that he had "no question" that Edna Coonan "could not have been convicted in a trial by herself" ("assuming", he went on, "the highly improbable assumption that anyone would try to try such a trial" (CA App. JA. at A-639)), he must deny a new trial because, as he "underst[oo]d the RICO statute, it's the purpose of Congress in enacting the statute to permit precisely

what was done here" (CA App. JA at A-639). The judge's apparent view that he had no discretion under Rule 14, Fed. R. Cr. P., to ignore what he recognized as incurable prejudice was summarily affirmed by the Court of Appeals.

This Court should grant the writ to rectify the serious miscarriage of justice suffered by Edna Coonan. RICO cannot be read to supersede fairness principles embodied in Rule 14. Edna Coonan should have had the chance to be judged on the basis of the evidence against her alone,[20] and RICO should not preclude it.

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[20] A separate trial would have spared Edna Coonan not only the spillover from monstrous evidence against her husband and others, but also such a devastating tactic as occurred when, in summation, the prosecutor broke into tears, pointed to James Coonan and called him a "damn butcher".

V. This Court Should Grant The Writ Because Use Of A Schizophrenic's Testimony Crucial To The Convictions, Without Permitting Evidence That The Disease Is Incurable And Affects Both Demeanor And The Ability To Be Truthful, Unconstitutionally Infringed The Right To Present A Defense

As recognized recently in Olden v. Kentucky, 488 U.S. ___, 102 L.Ed.2d 513, 519 (1988) (per curiam), it is unconstitutional to obtain a conviction by preventing a jury from receiving information from which it can "appropriately draw inferences relating to the reliability of the witness." In this case, the same miscarriage of justice occurred: the jury was prevented from learning information critical to an assessment of the reliability of Mickey Featherstone, the witness upon whose word

Edna Coonan's conviction turned,[21] and James Coonan's "enterprise" was constructed.[22]

Featherstone was a diagnosed paranoid schizophrenic: indeed, he was once acquitted of murder by reason of insanity, and he described himself as having been "a liar, an animal, a criminal", who "woke up every day and committed a crime everyday". He took the position, however, that, if he ever had been, he was no longer schizophrenic--his symptoms, he said, were gone (Tr. 2232-33). The jury thus heard nothing but

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[21] The other "Westie-wife" defendant, Florence Collins, received a 6-month sentence; Mrs. Coonan, whose conduct apart from that related by Featherstone was no "worse" than Mrs. Collins', was given a 15-year sentence premised on the RICO predicate (the Leone homicide) as to which Featherstone's testimony was key.

[22] Featherstone testified, inter alia, that he had been the "number two Westie", and that James Coonan had been "number one".

the name "schizophrenia" and the witness' own testimony that he was "cured" of this previously diagnosed condition.

Counsel proffered a psychiatrist, whose credentials were not disputed, to explain to the jury that schizophrenia is reality-distorting disorder that is not "curable". The expert was also prepared to explain that the disorder affected the ability to perceive reality (and so would affect the appearance of truthfulness, or demeanor). Counsel also sought permission for the psychiatrist to examine Featherstone.

The request and proffer were denied and the denial affirmed on appeal as a proper exercise of discretion.[23]

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[23] The trial judge, instead of allowing the defense psychiatrist to examine Featherstone, appointed his own expert, Dr. Goldstein, to do so (Dr. Goldstein was described In United States v. Vinieris, 611 F.Supp. 1046, 1047 (S.D.N.Y. 1985)

(continued...)

It cannot be proper, however, to prohibit evidence so important to the assessment of reliability. Indeed, this Court so held in Olden. To leave the jury with but the word of this schizophrenic that he was cured (of a mind-distorting disorder which was never explained), and with nothing to rebut his claim of "cure", was a violation of the right to defend: all the cross-examination of

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[23](...continued)
as a "government psychiatrist"). Despite Fed. R. Evid. 706, which requires defense input and cross-examination of even court-appointed experts, Dr. Goldstein, after examining Featherstone for a few hours (some weeks after his testimony), concluded in an uncross-examined report to the court that Featherstone had not been suffering from schizophrenia at the time of his testimony (a conclusion conflicting with the qualified defense expert's statement that the disease is not "curable"). The report to the court also specifically "took issue" with several of the proffered defense expert's statements. Though issues were thus raised by conflicting expert opinions which should have been resolved by the jury, the court precluded the defense expert totally, and never allowed examination or cross-examination of the court's expert.

Featherstone in the world, even with his concessions of having been "sick" or vicious or a liar in the past, could not substitute for an explanation of what schizophrenia really means.

What the disorder in fact entails is vital to present to a jury, which has no basis in everyday experience to know, because it affects reliability no less than the information withheld from the jury in Olden. Paranoid schizophrenia was indeed recognized as a serious disorder needing expert clarification by another Court of Appeals. United States v. Lindstrom, 698 F.2d 1154, 1160-61 (11th Cir. 1983). That court accepted testimony that a paranoid person interprets reality through antipathies or fantasies, and that a schizophrenic's disease may lead to "accusations resting on false memory, which may be very real to the accuser and

be narrated by him with strong and convincing feeling", but which may be far from what is "real" because of the accuser's sickness. Certainly, before one is convicted on a schizophrenic's word, he should at least be permitted to explain to the jury what the disease means.

Here, however, though instructed to determine credibility with reference to, inter alia, whether a witness "appeared" to tell the truth, the jury was deprived of information that would show that, as to a schizophrenic, such a yardstick is an insufficient gauge of truth.

Thus, though the denial of the expert testimony in this case rested on a rule of procedure where "discretion" normally controls, the exercise of "discretion" here constituted -- no less than in Olden -- a Due Process and Confrontation Clause

violation, precluding a fair defense based on unreliability of the evidence which only an expert could explain. This Court's intervention is required here to prevent a serious violation of the Sixth Amendment and a miscarriage of justice.

CONCLUSION

This Court should grant the writ and reverse the judgments of conviction.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of May, one thousand nine hundred and eighty-nine.

P R E S E N T :

HONORABLE GEORGE C. PRATT,

HONORABLE FRANK X. ALTIMARI,
Circuit Judges,

HONORABLE JOHN M. WALKER,
District Judge, Southern District of New York, sitting by designation.

[Argued May 15, 1989, Decided May 24, 1989]

Docket Nos. 88-1199, 88-1200, 88-1201,
88-1202, 88-1203, 88-1204, 88-1211
UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES COONAN, EDNA COONAN,
THOMAS COLLINS, JAMES McELROY,
RICHARD RITTER, FLORENCE COLLINS,
and WILLIAM BOKUN,

Defendants-Appellants.

These appeals from judgments of conviction entered in the United States District Court for the Southern District of New York, Whitman Knapp, Judge, came on to be heard on the transcript of the record and were argued.

ON CONSIDERATION WHEREOF, it is now ordered that the judgments appealed from are affirmed.

James Coonan, Edna Coonan, Thomas Collins, James McElroy, Richard Ritter, Florence Collins, and William Bokun were

convicted of participating in and conspiring to participate in the affairs of a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) and (d), as well as various substantive crimes corresponding to the racketeering acts. The charges stemmed from the defendants' involvement in the "Westies", an organized crime group that controlled criminal activities in the Hell's Kitchen section of New York City for a period of twenty years beginning in the mid-1960s.

At trial, the government offered evidence linking each defendant with the criminal affairs of the Westies, and viewed in the light most favorable to the government, e.g., United States v. Gurary, 860 F.2d 521, 523-24 (2d Cir. 1988), cert. denied, ___ S.Ct. ___ (No.

88-1252, Apr. 24, 1989), the evidence was more than sufficient to sustain the guilty verdicts.

Edna Coonan and James McElroy argue that the district court committed reversible error in precluding the defendants' expert witness from testifying about the psychiatric condition of one of the government's key witnesses, Francis "Mickey" Featherstone. It was undisputed that Featherstone had a history of mental and emotional problems, and at one time had been diagnosed as a paranoid schizophrenic. The defendants' expert had not personally examined Featherstone, but was prepared to testify that a person suffering from paranoid schizophrenia can never be "cured", is unable to perceive the difference between fantasy and reality, and is incapable of telling the truth.

Before ruling on this proffered testimony, Judge Knapp appointed an independent expert to examine Featherstone and review his medical history. The expert reported that "there is nothing that a psychiatrist might tell a jury that could clarify Mr. Featherstone's testimony, which seems to have been lucid and appropriate." The court's expert also disagreed with the substance of defendants' proposed expert testimony, and cautioned against extrapolating from medical records without performing an actual examination of the witness. The court's expert concluded that conflicting opinions about Featherstone's psychiatric records "might be very confusing and not add to what Mr. Featherstone has already reported about himself." After considering these findings, Judge Knapp refused to permit

the testimony of the defense expert.

The Federal Rules of Evidence give trial judges broad discretion in determining the admissibility of expert testimony. See, e.g., United States v. McBride, 786 F.2d 45, 49 (2d Cir. 1986). Even expert testimony that is otherwise admissible under rule 702 may be excluded if its probative value is substantially outweighed by the risk of misleading the jury, confusing the issues, or causing undue delay. Fed. R. Evid. 403. The details of Featherstone's psychiatric history were presented to the jury during extensive cross-examination, as were his prior crimes, his drug and alcohol abuse, and the evidence that he had lied under oath in the past. Judge Knapp instructed the jury to scrutinize Featherstone's testimony "with exceeding care", and consider whether it "fit in with the

testimony of other witnesses with respect to the same events". Judge Knapp acted well within his discretion in refusing to admit the proffered testimony of the defense psychiatrist.

Richard Ritter urges us to reverse the denial of his motion to suppress on the ground that the government agents who searched his apartment could not have relied in good faith on the validity of their search warrant. Ritter claims that the agents deliberately misled the magistrate by concealing the fact that some of the information in the warrant related to events that were more than a year old. If true, these allegations would preclude the government from relying on the "good faith" exception announced in United States v. Leon, 468 U.S. 897 (1984). Based on our examination of the record, however, we

find nothing to suggest that the alleged omissions were intended to mislead the magistrate. To the contrary, the officers provided the magistrate with a wealth of information concerning Ritter's ongoing participation in the Westies, and Ritter offers nothing but conjecture to support his allegations of deliberate misconduct. Thus, the district court did not err in admitting the evidence seized in Ritter's apartment.

We also reject William Bokun's assertion that Judge Knapp improperly limited the testimony of defense witness Patrick Hogan. In an attempt to rebut his tape-recorded admission to Sissy Featherstone that he was responsible for the Holly murder, Bokun called Hogan to testify (1) that while Mickey Featherstone and Hogan were incarcerated together at Rikers Island, Featherstone

told Hogan that he wanted Bokun to falsely admit that he had actually killed Holly, so that Sissy would have reason to hope for her husband's eventual vindication; and (2) that Hogan relayed Featherstone's request to Bokun. Although Judge Knapp limited Hogan's testimony regarding the first conversation to the extent it provided context for the second, Hogan's testimony about the second conversation clearly revealed the substance of what Featherstone wanted Bokun to do: "I met with Billy [Bokun], and I said to him, 'Mickey wants me to ask you to do him a favor.' * * * he wants you to stand up and say you did it, and then he'll come out and he'll find out what really happened and he'll get you out." The implication that Judge Knapp prevented Bokun from explaining his admission to

Sissy Featherstone is simply without merit.

Bokun also contends that the district court infringed his fifth and sixth amendment rights by appointing a substitute attorney instead of declaring a mistrial when Bokun's original attorney became ill eight weeks into the trial. Bokun concedes that the substitute attorney was not ineffective under either prong of the Strickland test, but argues that the attorney could not give him "as good representation as the prosecutors could give the government" because he was not present to observe the opening stages of the proceedings.

In fashioning this argument, Bokun essentially asks us to find a constitutional infringement without a showing of prejudice. We decline to take this step. Bokun's replacement counsel

was given adequate time to prepare, and the record clearly demonstrates that he represented Bokun effectively. Since Bokun has not demonstrated that he suffered prejudice as a result of the appointment of a substitute attorney, his claim on this point must also fall.

Finally, James Coonan asserts that Judge Knapp improperly charged the jury on the required nexus between the RICO enterprise and the various acts of racketeering. Consistent with our decision in United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981), Judge Knapp instructed the jury that a predicate act would be sufficiently related to the enterprise if "in committing [the act, the defendant] knowingly and willfully availed himself of the resources of the enterprise." Coonan argues that this prong of the

Scotto test should be limited to cases involving legitimate enterprises, because virtually anyone could "avail himself" of the resources of an illegal enterprise such as the Westies simply by using its name and reputation in order to advance personal ends wholly unrelated to the enterprise. Although Coonan is correct in pointing out that the Scotto case involved a legitimate enterprise, we have never limited the Scotto test to its facts. Indeed, we recently applied Scotto in a case involving the Mafia's ruling "Commission", United States v. Salerno, 863 F.2d 524, 533 (2d Cir. 1989), and at least one other circuit court has similarly applied the test to an illegitimate enterprise, see United States v. Yarborough, 852 F.2d 1522, 1544 (9th Cir.), cert. denied, 109 S.Ct. 171 (1988). Coonan has not provided us with

a compelling reason to limit the Scotto test to legitimate enterprises, and we see no reason to take this unprecedented step.

We have carefully considered the other arguments raised by appellants, and find them all to be without merit. Accordingly, the judgments appealed from are affirmed in all respects.

\s\ George C. Pratt
George C. Pratt, U.S.C.J.

\s\ Frank X. Altimari
Frank X. Altimari, U.S.C.J.

\s\ John M. Walker
John M. Walker, U.S.D.J.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 5th day of July one thousand nine hundred and eighty-nine.

Docket Nos. 88-1199(L), 88-1200, 88-1204

UNITED STATES OF AMERICA,

Appellee,

-v-

JAMES COONAN, EDNA COONAN, THOMAS COLLINS, JAMES McELROY, RICHARD RITTER, FLORENCE COLLINS, and WILLIAM BOKUN,

Defendants-Appellants.

Petitions for rehearing containing suggestions that the action be heard in banc having been filed herein by counsel

for the Defendant-appellant WILLIAM BOKUN and by counsel for the Defendant-appellant EDNA COONAN and by counsel for the Defendant-appellant JAMES COONAN

Upon consideration by the panel that heard the appeal, it is

Ordered that the said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

\s\ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 88-1199(L)

UNITED STATES OF AMERICA,

Appellee,

-against-

EDNA COONAN, et al.,

Defendants-Appellants.

[On consideration of defendant-appellant Edna Coonan's motion to stay the mandate for sixty days, to allow appellant time to apply to the United States Supreme Court for a writ of certiorari]

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

\s\ George C. Pratt
\s\ Frank X. Altimari
\s\ John M. Walker
Circuit Judges

Date: 7/17/89

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket No. S87 Cr. 00249-08(WK)

UNITED STATES OF AMERICA

vs.

JAMES COONAN,

Defendant.

In the presence of the attorney for the government, AUSA DAVID BRODSKY, the defendant appeared in person on this date 05-11-88

Counsel

X With Counsel GERALD SHARGEL

Finding & Judgment

There being a finding/verdict of X NOT GUILTY as to count 14 [and] X GUILTY as to counts 1, 2, 3, 4, 5, 6, 7, 11, 12 & 15. Defendant has been convicted as charged of the offense(s) of

racketeering enterprise; racketeering conspiracy; violent crime in aid of racketeering enterprise; conspiracy to make extortionate extensions of credit; financing extortionate extensions of credit; conspiracy to use extortionate means to collect extensions of credit; conspiracy to interfere with commerce by threats or violence; conspiracy to evade income tax (T[itle] 18, U.S.C., §§ 1961, 1962(c), 1962(d), 1952B, 2, 891, 892, 893, 894, 1951 and 371).

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered

that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SEVENTY FIVE (75) YEARS. TWENTY (20) YEARS on each of counts 1, 2 and 3. TEN (10) YEARS on count 4 to run CONCURRENTLY WITH COUNT 3. TEN (10) YEARS on each of counts 5, 6, 7, 11 and 12. FIVE (5) YEARS on count 15. Counts 1, 2 and 3 to run consecutively to each other. Counts 5, 6, 7, 11 and 12 to run CONCURRENTLY with each other but CONSECUTIVELY to counts 1, 2 and 3. Count 15 to run CONSECUTIVELY to all prior counts. Defendant is FINED the sum of TWO HUNDRED AND FIFTY THOUSAND (250,000) DOLLARS each on counts 1, 2, 5 and 15. TOTAL FINE in the amount of ONE MILLION (1,000,000) DOLLARS. Pursuant

to Title 18, U.S.C., § 3013, defendant is ASSESSED the sum of FIFTY (50) DOLLARS on each of counts 1, 2, 3, 4, 5, 6, 7, 11, 12 and 15. TOTAL ASSESSMENT in the sum of FIVE HUNDRED (500) DOLLARS. The underlying indictment 87 Cr. 249(WK) is dismissed on the motion of the Court.

Special Conditions of Probation

[None]

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period

of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends the defendant be denied consideration for parole.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

\s\ Whitman Knapp
Whitman Knapp
U.S. District Judge
Date 5/13/88

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket No. S87 Cr. 00249-07(WK)

UNITED STATES OF AMERICA

vs.

EDNA COONAN,

Defendant.

In the presence of the attorney for the government, AUSA DAVID BRODSKY, the defendant appeared in person on this date 05-11-88

Counsel

X With Counsel FRANK LOPEZ

Finding & Judgment

There being a finding/verdict of X NOT GUILTY on counts 6 and 14 [and] X GUILTY on counts 1, 2, 5, 7 & 15. Defendant has been convicted as charged of the offense(s) of

racketeering enterprise; racketeering conspiracy; violent crime in aid of racketeering enterprise; conspiring to make extortionate extensions of credit; conspiring to use extortionate means to collect extensions of credit; conspiring to evade income tax (T[itle] 18, U.S.C., §§ 1961, 1962(c), 1962(d), 891, 892, 894 and 371).

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a

period of FIFTEEN (15) YEARS on each of counts 1 and 2 to run CONCURRENTLY with each other. FIVE (5) YEARS on each of counts 5, 7 and 15 to run CONCURRENTLY with each other as well as the sentence imposed on counts 1 and 2. The defendant is FINED the sum of TWO HUNDRED THOUSAND (200,000) DOLLARS on count 1. Pursuant to Title 18, U.S.C., § 3013, the defendant is ASSESSED the sum of FIFTY (50) DOLLARS on each of counts 1, 2, 5, 7 and 15. TOTAL ASSESSMENT in the sum of TWO HUNDRED AND FIFTY (250) DOLLARS. The underlying indictment 87 Cr. 249(WK) is dismissed on the motion of the Court.

BAIL CONDITIONS CONTINUED PENDING APPEAL

Special Conditions of Probation

[None]

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

EDNA COONAN - 15 VAN MATER TERRACE-HAZLET, NEW JERSEY 07730

DEFENDANT IS TO NOTIFY AUSA DAVID BRODSKY OF ANY CHANGE OF ADDRESS

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

\s\ Whitman Knapp
Whitman Knapp
U.S. District Judge
Date 5/12/88

APPENDIX F

PERTINENT CONSTITUTIONAL PROVISIONS

ARTICLES IN ADDITION TO, AND AMENDMENT OF THE UNITED STATES CONSTITUTION

[AMENDMENT IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons of things to be seized.

[AMENDMENT V]

No person shall be . . . deprived of life, liberty or property, without due process of law; . . . .

[AMENDMENT VI]

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . .

APPENDIX G

PERTINENT STATUTORY PROVISIONS AND RULES

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 et seq. (1986), provides in pertinent part:

§ 1961. Definitions

As used in this chapter--

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 891-894 (relating to extortionate credit transactions), . . . section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), ...

* * * * *

§ 1962. Prohibited Activities

* * * * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Rule 14 of the Federal Rules of Criminal Procedure, 18 U.S.C., Fed. R. Cr. P. (1986), provides in pertinent part:

Rule 14. Relief From Prejudicial Joinder

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires . . . .

The pertinent provisions of the Federal Rules of Evidence, 28 U.S.C., Fed. R. Evid. (1987), provide:

Rule 602. Lack of Personal Knowledge

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony . . . .

* * * * *

Rule 801. Definitions

The following definitions apply under this article:

* * * * *

(d) Statements which are not hearsay.

A statement is not hearsay if--

* * * * *

(2) Admission by party-opponent.

The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

* * * * *

Rule 806. Attacking and Supporting Credibility of Declarant

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked, may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. . . .

(2)

Nos. 89-379, 89-5497, 89-5512, and 89-5601

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES COONAN AND EDNA COONAN, PETITIONERS

v.

UNITED STATES OF AMERICA

RICHARD RITTER, PETITIONER

v

UNITED STATES OF AMERICA

WILLIAM BOKUN, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES MCELROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
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26 pp

QUESTIONS PRESENTED

1. Whether the co-conspirator exception to the hearsay rule applies when the conspiracy alleged is a conspiracy to violate the racketeering laws (89-379 Pet. 26-39; 89-5601 Pet. 10-13).

2. Whether the district court properly instructed the jury on the requisite nexus between the RICO enterprise and the predicate acts of racketeering (89-379 Pet. 40-45; 89-5601 Pet. 17-23).

3. Whether the district court properly denied the motions of petitioners James Coonan, Edna Coonan, and Richard Ritter to suppress evidence seized pursuant to search warrants (89-379 Pet. 46-54; 89-5497 Pet. 9-14).

4. Whether the district court properly refused to sever the trial of Edna Coonan (89-379 Pet. 54-55).

5. Whether the district court properly excluded expert testimony concerning the psychiatric condition of a government witness (89-379 Pet. 56-62; 89-5512 Pet. 27-36; 89-5601 Pet. 13-16).

6. Whether the district court improperly restricted petitioner Bokun's direct examination of a government witness (89-5512 Pet. 13-26).

7. Whether petitioner Bokun was denied his rights to counsel and to a fair trial when his attorney fell ill eight weeks into a five-month trial, and the district court appointed an attorney to represent Bokun during his regular counsel's absence (89-5512 Pet. 37-49).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rule—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-379

JAMES COONAN AND EDNA COONAN, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 89-5497

RICHARD RITTER, PETITIONER

v

UNITED STATES OF AMERICA

No. 89-5512

WILLIAM BOKUN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 89-5601

JAMES MCELROY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 876 F.2d 891 (Table).[1]

[1] "Pet. App." refers to the appendix to the petition in No. 89-379.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1989. Petitions for rehearing were denied on July 5, 1989 (Pet. App. 14a-15a). The petition for a writ of certiorari in No. 89-5497 was filed on September 1, 1989; the petition in No. 89-379 was filed on September 2, 1989; and the petitions in Nos. 89-5512 and 89-5601 were filed on September 5, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of participating in and conspiring to participate in the affairs of a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) and (d), as well as various substantive crimes corresponding to the racketeering acts.[2] James Coonan was sentenced to 75 years' imprisonment and

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[2] All petitioners were convicted of the RICO charges. In addition, all but Bokun were convicted of conspiracy to make extortionate extensions of credit, in violation of 18 U.S.C. 892, and conspiracy to use extortionate means to collect extensions of credit, in violation of 18 U.S.C. 894. James Coonan and McElroy were also convicted of attempted murder and assault, in violation of 18 U.S.C. 1952B (Supp. V 1987); conspiracy to commit murder, in violation of 18 U.S.C. 1952B (Supp. V 1987); and conspiracy to commit extortion against the International Brotherhood of Teamsters and the International Longshoremen's Association, in violation of 18 U.S.C. 1951. James Coonan and Edna Coonan were convicted of conspiring to evade income taxes, in violation of 18 U.S.C. 371, and James Coonan was also convicted of financing extortionate extensions of credit, in violation of 18 U.S.C. 893. Finally, Ritter and Bokun were convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846.

a $1 million fine; Edna Coonan was sentenced to 15 years' imprisonment and a $200,000 fine; McElroy was sentenced to 60 years' imprisonment; Ritter was sentenced to 40 years' imprisonment; and Bokun was sentenced to 50 years' imprisonment.

1. The charges against petitioners stemmed from their involvement in the "Westies," an organized crime group that controlled criminal activities in the Hell's Kitchen section of New York City for a 20-year period beginning in the mid-1960's. Members of the Westies terrorized and exploited the community through a series of murders and a variety of illegal schemes involving kidnapping, extortion, loansharking, gambling, and drug distribution. In three especially brutal murders, the bodies of the Westies' victims were dismembered and dumped into the East River. Additionally, the Westies were involved in schemes to extort money and jobs from labor unions doing business in Hell's Kitchen. Gov't C.A. Br. 5-6.

James Coonan supervised the gang's activities and received most of its criminal proceeds. During Coonan's incarceration in the 1960's and 1970's on a murder conviction, his wife Edna managed the gang's loansharking operation and relayed important messages from Coonan to his subordinates, including Coonan's instructions to murder a union official who was skimming money from the Westies. McElroy was one of Coonan's chief enforcers, and in that capacity he committed murder, loansharking, and extortion. Bokun also committed murder for the gang and operated a substantial cocaine business. Ritter distributed large amounts of cocaine and engaged in numerous loansharking transactions. Gov't C.A. Br. 6-7.

2. The court of appeals affirmed petitioners' convictions in an unpublished opinion. Pet. App. 1a-13a. The court explicitly considered and rejected most of the claims petitioners have raised in this Court; as to the remaining claims, the

court of appeals explained that it had "carefully considered the other arguments raised by [petitioners]" but had found them to be without merit. *Id.* at 13a.

ARGUMENT

1. a. Petitioners James Coonan, Edna Coonan, and McElroy contend (89-379 Pet. 26-39; 89-5601 Pet. 10-13) that the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) should not apply to racketeering conspiracies. According to petitioners, application of the co-conspirator exception is fundamentally unfair in a RICO conspiracy because such a charge is broader than a traditional conspiracy and can involve highly diverse crimes by apparently unrelated individuals. That contention is meritless.

The co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) applies by its terms to all conspiracies, regardless of their objects, size, or scope. Moreover, the courts have routinely applied the co-conspirator rule in RICO cases. See, *e.g.*, *United States* v. *Ruggiero*, 726 F.2d 913, 923-924 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Lemm*, 680 F.2d 1193, 1204 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States* v. *Calabrese*, 645 F.2d 1379, 1386 (10th Cir.), cert. denied, 451 U.S. 1018 (1981). See also *United States* v. *Hewes*, 729 F.2d 1302, 1313 (11th Cir. 1984) (rejecting the claim that Rule 801(d)(2)(E) should be inapplicable to RICO cases), cert. denied, 469 U.S. 1110 (1985). There is no reason, in the context of RICO prosecutions, to depart from this Court's holding in *Bourjaily* v. *United States*, 483 U.S. 171, 182-184 (1987), that a court need not make an independent inquiry into the reliability of co-conspirator statements that are otherwise admissible under Rule 801(d)(2)(E). Although petitioners contend (89-379 Pet. 33-34) that RICO con-

spirators will not "know[ ] anything of the goals, much less the workings, of all predicate conduct" in the conspiracy, the same claim could be made about any other multiple-object conspiracy.[3]

b. Petitioner McElroy contends (89-5601 Pet. 6-10) that tape-recorded statements made by his girlfriend, Fran Mostyn, on January 15, 1987, to an undercover agent, in which she implicated McElroy in a prior Westies' killing, were improperly admitted under Rule 801(d)(2)(E). He asserts that Mostyn was not a conspirator, and that the statements were not made in furtherance of the racketeering conspiracy.

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[3] Petitioners contend (89-379 Pet. 36-39; 89-5601 Pet. 11) that the decision below conflicts with *United States* v. *Angiulo*, 847 F.2d 956 (1st Cir.), cert. denied, 109 S. Ct. 138 (1988). The court of appeals in that case expressed concern about an instruction that allowed the jury to consider co-conspirator statements in connection not only with the RICO counts, but also with an obstruction of justice count to which they were not relevant. The court nonetheless concluded that the error, if any, in failing to give a limiting instruction did not harm the defendant. 847 F.2d at 971-972. In the present case, petitioners at trial did not request a limiting instruction as to the use to which co-conspirator statements could be put, and they have therefore not preserved that issue. In any event, no such limiting instruction was required. All of the non-RICO offenses on which petitioners were convicted were also charged as predicate racketeering acts under the RICO counts. Since a defendant is liable for all offenses committed by any co-conspirator during the course of, and in furtherance of, a conspiracy in which both are members (*Pinkerton* v. *United States*, 328 U.S. 640, 645 (1946); *Angiulo*, 847 F.2d at 969-970), any evidence that was admissible to prove that petitioners were members of the RICO conspiracy was also relevant and admissible to show their liability on the offenses that were committed as predicate acts in furtherance of the RICO conspiracy, as charged in the indictment. In such circumstances, as the *Angiulo* court noted (*id.* at 972 n.20), a district court may instruct the jury that co-conspirator statements are admissible to prove the RICO and other offenses charged as predicate acts under the RICO counts.

On January 15, 1987, several weeks after McElroy was arrested on a murder charge, Fran Mostyn met with Westie member William Beattie and undercover police officer Ronald Stripp to discuss amphetamine sales and a contract murder that McElroy had offered to commit for Stripp. The conversation was tape-recorded. Mostyn responded to reservations expressed by Stripp about McElroy by saying that the murder case against McElroy was weak, that McElroy was a reliable and hard-working member of the Westies, and that his most recent accomplishment was the shooting of a union official. Gov't C.A. Br. 73-74.

The district court correctly found (see Gov't C.A. Br. 78) that Mostyn was a member of the RICO conspiracy and that her statements were made in furtherance of the conspiracy. The evidence showed that Mostyn provided substantial assistance to McElroy in his dealings with Westie members. She attended several conspiratorial meetings; she sold thousands of amphetamine pills on McElroy's behalf; and, as McElroy's agent, she negotiated for the commission of a contract murder by the Westies. Moreover, Mostyn's statements furthered the conspiracy by reassuring Beattie and Stripp that McElroy was a valuable member of the Westies and that he would soon be available for criminal activity. The statements also apprised Stripp—purportedly a newcomer to the Westies—of McElroy's high-ranking position within the enterprise. *Id.* at 79-80.

2. Petitioners James Coonan, Edna Coonan, and McElroy (89-379 Pet. 40-45; 89-5601 Pet. 17-23) contend that the district court failed to instruct the jury properly on the required nexus between the racketeering acts and the enterprise. The court of appeals correctly rejected that claim.

The RICO statute makes it a crime for a person associated with an enterprise whose activities affect commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering

activity * * *." 18 U.S.C. 1962(c). To establish the required nexus between a RICO enterprise and the predicate acts of racketeering, the government must show either that the defendant was "enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise" or that "the predicate offenses are related to the activities of that enterprise." *United States* v. *Robilotto*, 828 F.2d 940, 947-948 (2d Cir. 1987) (emphasis omitted), cert. denied, 484 U.S. 1011 (1988). Accord *United States* v. *Jannotti*, 729 F.2d 213, 226 (3d Cir.), cert. denied, 469 U.S. 880 (1984).

The district court's instructions here clearly fell within those standards. The court instructed the jury that the required nexus between the RICO enterprise and the acts of racketeering could be established if "either the act was committed by the defendant you are considering for the knowing and willful purpose of furthering the enterprise, or, in committing it, he knowingly and willfully availed himself of the resources of the enterprise." The court further instructed the jury that the Westies' "reputation for violence" was one alleged resource of the enterprise of which a defendant could have availed himself. Gov't C.A. Br. 153.

Petitioners nonetheless complain (89-379 Pet. 44; 89-5601 Pet. 20-21) that the instruction was deficient because the "resource" in question—the enterprise's reputation for violence—was freely available to anyone, whether or not associated with the enterprise. For that reason, McElroy contends (89-5601 Pet. 20-21) that "the charge given allowed findings that an act was 'related to the affairs of the enterprise' where an individual may in fact have had no verifiable support at all from the enterprise (such as money, weapons, personnel, etc.), but rather merely helped himself to the 'Westies' name to commit an independent, 'personal' crime."

That contention is incorrect. The trial court instructed the jury that a person who invoked the enterprise's reputa-

tion for violence solely in order to commit an independent personal crime was not culpable under RICO. As the trial court put it: "[T]he mere fact that you may have decided that there is an enterprise and that a given defendant was associated with it, does not establish that a particular crime he may have committed was related to the enterprise. In other words, a person does not sell his soul to the enterprise by becoming associated with it, but he continues to be free to commit good acts or bad acts on his own." Gov't C.A. Br. 153.

3. Petitioners James Coonan, Edna Coonan, and Richard Ritter (89-379 Pet. 46-54; 89-5497 Pet. 9-14) challenge certain searches conducted during the investigation. The Coonans contend that the affidavits supporting the search warrants did not establish probable cause that the evidence sought would be found at the locations named (89-379 Pet. 46-48), and that the warrants were overly broad. Petitioner Ritter claims that the evidence recited in the affidavit supporting the search warrant for his house was stale, and that the agent who prepared the affidavit intentionally misled the magistrate about the staleness of the evidence. Accordingly, he reasons, the good-faith exception to the exclusionary rule does not apply.

a. On June 23, 1986, federal agents executed a search warrant for the Coonans' residence in New Jersey. The warrant authorized the agents to search for:

> evidence of loansharking and extortion records (including the names of victims, collectors, partners, and/or bankers, and the amounts and interest due, collected, and/or paid), means or equipment/tools of collection, and proceeds; and other evidence of violations of 18 U.S.C. 1962(c) (including predicate acts of loansharking and extortion) and the fruits thereof.

The agents seized approximately five cartons of documents from that residence. Two days later, agents

executed a search warrant for a safe deposit box maintained by the Coonans at a local bank. The warrant authorized a search for essentially the same list of evidence. Agents seized several financial records from the box. Gov't C.A. Br. 123-124.

The warrant authorizing the search of the Coonans' residence was supported by the affidavits of Detectives Frank Pergola and Stephan Mshar of the New York City Police Department. The warrant authorizing the search of the Coonans' safe deposit box was supported by the same two affidavits, as well as by the affidavit of Detective Harry Brady. The Mshar affidavit, relying on three confidential sources, described the criminal enterprise known as the Westies and detailed some of the group's illegal activities over a 10-year period. Among other things, the affidavit stated that James Coonan was the leader of the Westies gang and that any money made by the group flowed to him. The affidavit further recited that Edna Coonan and Richard Ritter were gang members, and it described in detail the Westies' loansharking and extortion operation, including a list of Coonan's loansharking partners and customers. The affidavit recited that loansharking proceeds had been turned over to Coonan as recently as May and June 1986. Gov't C.A. Br. 124-127.

The Pergola affidavit recited a statement by Detective Mshar that, based on his experience in undercover narcotics investigations, he believed that narcotics traffickers generally keep records of sales and distributions in secure locations to which they have ready access, such as their homes. It also contained statements by two FBI agents that loansharks make and maintain records of their illegal activities in much the same way as narcotics traffickers do. Gov't C.A. Br. 129.

The Brady affidavit recounted the results of the search of the Coonans' residence, from which financial records, bank statements for 12 bank accounts, and two keys and

the receipt to a safe deposit box had been seized. The Brady affidavit also set forth the expert opinions of the two FBI agents that loansharks generally keep loansharking records in secure places within their residences or in safe deposit boxes to hide them from law enforcement agents. Gov't C.A. Br. 129-130.

b. There was ample probable cause to believe that evidence of loansharking activity would be found at the Coonans' residence and in their safe deposit box. The Mshar affidavit demonstrated that Coonan was the boss of the Westies' loansharking and extortion activities and that Edna Coonan served as her husband's helper. The affidavit also showed that Coonan was the personal repository of the Westies' loansharking loot. Moreover, two FBI agents, based on their training and experience in loansharking and extortion investigations, stated what common sense confirms—that loansharks generally maintain business records of their criminal activities and ill-gotten gains, just as narcotics traffickers do, and that those records are often kept within their residences or in other secure places, such as safe deposit boxes. Those showings amply supported the search of the Coonans' home and safe deposit box. See *United States* v. *Cruz*, 785 F.2d 399, 405-406 (2d Cir. 1986); *United States* v. *Fama*, 758 F.2d 834, 838 (2d Cir. 1985); *United States* v. *Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970).

The search warrants were not insufficiently particular. The particularity requirement of the Fourth Amendment is satisfied when the description of the objects of the warrant "enables the searcher to reasonably ascertain and identify the things authorized to be seized." *United States* v. *Wuagneux*, 683 F.2d 1343, 1348 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983). Here, the warrants authorized a search for evidence of loansharking and extortion records, and they contained a list of items described as specifically as possible, such as records containing "names of victims,

collectors, partners, and/or bankers, and the amounts and interest due, collected, and/or paid." Gov't C.A. Br. 123. The fact that the warrants concluded with language authorizing a search for "other evidence of violations of 18 U.S.C. § 1962(c)" did not make the warrants overly broad; rather, as this Court has held, such general language at the end of a warrant must be read as restricted to the specific offenses itemized in the warrant. *Andresen* v. *Maryland*, 427 U.S. 463, 479-482 (1976) (upholding a warrant authorizing a search for particularly described documents "together with other fruits, instrumentalities and evidence of crime at this [time] unknown"). See also *United States* v. *Perdomo*, 800 F.2d 916, 920 (9th Cir. 1986) ("general language located at the end of a warrant is to be viewed as relating only to the specific offense named in preceding portions of the warrant"); *United States* v. *Young*, 745 F.2d 733, 759 (2d Cir. 1984) ("the boilerplate ['other evidence'] language * * * followed a list of more specific items to be seized, and could be construed only in conjunction with that list"), cert. denied, 470 U.S. 1084 (1985).[4]

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[4] Petitioners allege (89-379 Pet. 49-50 & n.18) that the court of appeals' conclusion that the warrant was not overbroad conflicts with decisions of several other circuits. The cases relied upon by petitioners do not support that claim. In *United States* v. *Leary*, 846 F.2d 592, 601-604 (10th Cir. 1988), the warrant in question authorized a search for numerous listed documents "and other records and communications relating to the purchase, sale and illegal exportation of materials in violation of the Arms Export Control Act." *Id.* at 594. Thus, the warrant entitled the agents to seize essentially all documents that the agents thought might help to prove the violation of particular export statutes. The warrant was too broad because it permitted the agents to exercise a legal judgment as to what, if anything, constituted a violation of the statutes. In holding that the warrant was overly broad, however, the *Leary* court emphasized that "it is not the mere reference to the statute that makes the * * * warrant overbroad, it is the *absence of any limiting features*" (*id.* at 601 n.15). Similarly, in *United States* v. *Roche*, 614

c. On June 20, 1986, agents executed a warrant to search Ritter's residence for, *inter alia*, cocaine, firearms, and stolen art work. Pursuant to the warrant, agents seized narcotics residue, dilutents, narcotics paraphernalia, and an automatic handgun and ammunition. In addition to the information contained in the Mshar and Pergola affidavits, the affidavits submitted in support of the Ritter warrant detailed Ritter's long-standing association with the Westies. For example, the affidavits recited that three confidential sources disclosed that Ritter was at the time, and for years had been, a Westies crew member; that Coonan had arranged to murder someone in 1978 as a favor to Ritter; and that in connection with the Westies' ongoing narcotics distribution operation, Ritter had purchased a quantity of cocaine on consignment from a fellow Westie on April 4, 1979. Gov't C.A. Br. 146-147.

The Mshar affidavit provided further evidence of Ritter's involvement with firearms. It stated that on an unspecified date one of the confidential sources had seen a cache of weapons, narcotics, and stolen property at Ritter's residence; that within the past two years Ritter had sold a fellow Westie an "untraceable" shotgun; and that when Ritter was arrested in 1978, he had thrown away a .22 calibre Derringer. Finally, the Brady affidavit described a June 17, 1986, interview with one of the confidential sources, in which the source had stated that Ritter's current residence was the same as the one in which the source had previously seen the cache of

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F.2d 6, 7 (1st Cir. 1980), *United States* v. *Cardwell*, 680 F.2d 75, 77 (9th Cir. 1982), and *Rickert* v. *Sweeney*, 813 F.2d 907, 909 (8th Cir. 1987), the only limitation on the items to be seized was the requirement that the items be evidence of violations of specific statutes. In the present case, by contrast, the warrant specifically described the types of evidence for which the agents were to search, and it did not leave to their unfettered discretion the task of determining what evidence constituted a violation of the statute in question.

weapons, and that Ritter was listed on the building directory as "Mr. Rogers." The affidavit recited that Detective Mshar had confirmed that information by visiting the building on June 19, 1986, and noting the name "Rogers" on the bell for Ritter's apartment. Gov't C.A. Br. 147.

The district court denied Ritter's motion to suppress the evidence seized from his residence. In rejecting Ritter's motion, the court declined to resolve the question whether there was probable cause to conduct the search. Rather, relying on *United States* v. *Leon*, 468 U.S. 897 (1984), the court admitted the seized evidence because of the searching agents' good faith reliance on the validity of the warrant. Gov't C.A. Br. 145-146.

d. Ritter claims, as he did below, that the agents deliberately misled the magistrate by concealing the fact that some of the information in the warrant was stale. The court of appeals examined the record on that point and found "nothing to suggest that the alleged omissions were intended to mislead the magistrate." Pet. App. 8a. As the court noted (*ibid.*), "the officers provided the magistrate with a wealth of information concerning Ritter's ongoing participation in the Westies." Those conclusions, affirming the findings of the trial court, warrant no further review.

4. Claiming that there was a prejudicial spillover of evidence, petitioner Edna Coonan argues (89-379 Pet. 54-55) that the district court committed reversible error in refusing to sever her trial from that of her husband. In fact, however, there was no prejudicial spillover; the evidence against James Coonan was readily segregable from the evidence against Edna, and the jury could easily make the required distinctions. The jury evidently understood its responsibility to consider the evidence against each defendant separately, since it acquitted Edna Coonan on some

counts.[5] See *United States* v. *Kabbaby*, 672 F.2d 857, 862 (11th Cir. 1982). In any event, a separate trial would not have helped Edna Coonan, since at any such trial the evidence of her husband's acts would have been admissible against her to establish the RICO conspiracy and the RICO enterprise.[6]

5. Petitioners James Coonan, Edna Coonan, McElroy, and Bokun contend (89-379 Pet. 56-62; 89-5601 Pet. 13-16; 89-5512 Pet. 27-36) that the district court erred in excluding expert testimony concerning the psychiatric condition of government witness Francis "Mickey" Featherstone.

Petitioners sought at trial to establish that Francis "Mickey" Featherstone, a government witness, was suffering from schizophrenia and for that reason was unworthy of belief. To that end, they sought to call Dr. Daniel Crane, a psychiatrist, to testify that someone suffering from paranoid schizophrenia can never be cured and is incapable of telling the truth. Observing that Featherstone had

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[5] Edna Coonan was acquitted of tax evasion and financing extortionate credit transactions. Gov't C.A. Br. 4.

[6] We do not understand the district court's comment (see 89-379 Pet. 54) that Edna Coonan "could not have been convicted in a trial by herself." The evidence against Edna Coonan was strong. It showed that from 1979 until 1984, while her husband was incarcerated, Edna Coonan regularly collected money from the Westies' middle-level loansharks; she occasionally complained about delinquent debtors who she suggested would be punished by her husband following his release from prison; she relied on the Westies' enforcers to assist her in the collection of the gang's loansharking money; she renewed at least one extension of credit to finance one of the gang's mid-level loansharks; in 1983 she relayed a message from her husband to Featherstone directing Featherstone to kill someone who had absconded with a lot of "shylock" money; and she directed Featherstone to put another Westies gang member out of the loansharking business or "do whatever you guys want with him" because that member was skimming loansharking money. See Gov't C.A. Br. 37-40.

seemed to be both competent and truthful, the district court nonetheless sought the advice of an impartial expert, Dr. Naomi Goldstein, before ruling on petitioners' motion. Dr. Goldstein reviewed Featherstone's medical history, his trial testimony, and the proposed testimony of Dr. Crane. She also interviewed Featherstone's counsel and one of the marshals who had charge of Featherstone, and she examined Featherstone himself. Dr. Goldstein found "no major psychiatric disturbance that would have so disturbed [Featherstone's] thinking that he was living in a fantasy world or suffering from a paranoid disorder, and no other mental disorder that would have interfered with intellectual function, concentration, memory and attention." Dr. Goldstein explained that nothing that a psychiatrist might tell a jury would clarify Featherstone's testimony, which seemed to have been "lucid and appropriate." Dr. Goldstein also took exception to Dr. Crane's proposed testimony, disagreeing with him on many points, "as well as with the extreme positions he takes, particularly without having examined Mr. Featherstone." Gov't C.A. Br. 110-111. Dr. Goldstein concluded (*id.* at 111):

> I have considerable concern about the psychiatric history and records as these require very careful interpretation before extrapolating from them. In my opinion differing opinions about these records and in the records themselves, might be very confusing and not add to what Mr. Featherstone has already reported about himself.

Based in large measure on Dr. Goldstein's report, the district court excluded Dr. Crane's testimony. *Ibid.*

During the cross-examination of Featherstone, which lasted for five days, defense counsel questioned Featherstone concerning his convictions, crimes, and bad acts; his abuse of cocaine and bouts with alcoholism; his prior lies and per-

juries; his animus toward some of the defendants and his attempts at revenge; his failed first marriage and his extramarital relationships; his alleged sexual perversions; his feelings of anger and rage; his agreement and disagreements with the government; his full psychiatric history, including the time he spent in mental hospitals; the medications administered to him; and the fact that he had once been diagnosed as suffering from "paranoid schizophrenia." Gov't C.A. Br. 112-113.

As this Court has recognized, a trial judge enjoys broad discretion in deciding whether to admit expert testimony (*Hamling* v. *United States*, 418 U.S. 87, 127 (1974)), and a trial court's determination that psychiatric testimony is not admissible to impeach the credibility of a witness will not be disturbed absent clear error. *United States* v. *Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975), cert. denied, 424 U.S. 911 (1976). In light of the court-appointed expert's detailed findings, the trial court acted well within its discretion in excluding Dr. Crane's testimony on the ground that his testimony would be more likely to confuse than assist the jury. See, *e.g.*, *United States* v. *Schmidt*, 711 F.2d 595, 598-599 (5th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); *United States* v. *Lord*, 711 F.2d 887, 892 (9th Cir. 1983).

Moreover, defense counsel was given extremely broad latitude in cross-examining Featherstone over a five-day period. Furthermore, the district court cautioned the jury to weigh Featherstone's credibility with special care, not only because Featherstone was an accomplice witness, but also because of his psychiatric history. Gov't C.A. Br. 112-113. In these circumstances, as the court of appeals concluded (Pet. App. 7a), the district judge "acted well within his discretion in refusing to admit the proffered testimony of * * * [Dr. Crane.]"

6. Petitioner Bokun claims (89-5512 Pet. 13-26) that the district court committed reversible error in restricting his direct examination of a defense witness.

On May 18, 1986, petitioner Bokun confessed to Sissy Featherstone, Mickey Featherstone's wife, that he had killed Michael Holly (whom the Westies blamed for the murder of Bokun's brother John). Bokun described how he had disguised himself; how he had shot Holly five times in the back; and how he had smiled at Holly's dying words. Bokun's admissions were secretly tape-recorded by Sissy Featherstone and admitted against Bokun at trial. Gov't C.A. Br. 19-20, 83-84.

In an attempt to cast doubt on the truthfulness of his own admissions, Bokun called Patrick Hogan as a witness. According to Bokun, Hogan would testify that Mickey Featherstone (who had been charged with the Holly murder) had told him to instruct Bokun to admit falsely that he had killed Holly, so that Sissy would have reason to hope for her husband's eventual release from jail. According to Bokun, Hogan would testify that he had relayed Featherstone's request to Bokun. The district court ruled that the Hogan-Bokun conversation was admissible, and that the government could elicit the Hogan-Featherstone conversation in order to place the former conversation in context. Pet. App. 8a-9a.

Thereafter, on direct examination, Hogan testified that he had had a conversation with Featherstone concerning Bokun, and that following the conversation he had spoken with Bokun (Gov't C.A. Br. 85; Pet. App. 9a):

> I met with Billy [Bokun], and I said to him, "Mickey [Featherstone] wants me to ask you to do him a favor." And I said he said, "Being that the cops are lying and all of this is going on, he is afraid of getting convicted, if this should happen, and he said that Sissy was a

> wreck," which she honestly was, and he said, "If this should happen, that he wants you to stand up and say you did it, and then he'll come out and he'll find out what really happened and he'll get you out."

On cross-examination, Hogan testified further about his conversation with Featherstone. In addition, Hogan testified that Featherstone consistently maintained his innocence of the Holly murder. Gov't C.A. Br. 85-86.[7]

Bokun argues that the district court should have allowed him to question Hogan in more detail about his conversation with Featherstone. According to petitioner, the limitation on direct examination prevented him from "elicit[ing] those portions of the conversation that demonstrated that Featherstone had told Hogan to ask Bokun *to lie* about killing Holly in order to calm Sissy Featherstone." 89-5512 Pet. 18.

That characterization of the court's limitation is inaccurate. The court permitted Hogan to testify about his conversation with Bokun. According to his testimony, Hogan told Bokun that Featherstone wanted Bokun to confess to Sissy Featherstone that it was he, not Featherstone, who had killed Holly. As the court of appeals explained (Pet. App. 9a), that testimony "clearly revealed the substance of what Featherstone wanted Bokun to do." There is no basis for Bokun's contention that the trial court precluded him from establishing the defense that his confession to Sissy Featherstone was false.

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[7] The evidence at trial showed that on the day of Holly's murder, Bokun, wearing an elaborate disguise, approached Holly on a crowded Manhattan street, fired five bullets into Holly's back, and escaped in a getaway car driven by Westie Kenneth Shannon. Bokun wore a hat, wig, and sunglasses, and had a faint mustache penciled in. Bokun wore heavy theatrical makeup to cover a prominent birthmark on his face. Gov't C.A. Br. 20.

7. Finally, Bokun contends (89-5512 Pet. 37-49) that he was denied his rights to counsel and to a fair trial when the district court appointed a substitute counsel to assist in his representation.

Two months into the trial, on November 30, 1987, Alfred Christiansen, counsel for petitioner Bokun, advised the court that he had an ear infection and would have to excuse himself to obtain medical attention. Government counsel assured the court that the proof would not implicate Bokun until the following week, and, with Bokun's consent, counsel for a co-defendant substituted for Mr. Christiansen. When Mr. Christiansen did not appear on December 7, as co-counsel predicted he would, the trial was adjourned until December 8 so that the government could reorder its proof in order to avoid implicating Bokun. Gov't C.A. Br. 93-94.

On December 14, the trial judge telephoned Christiansen and learned that he might be absent for another week or two. The judge then appointed attorney Austin Campriello to represent Bokun as co-counsel. The judge advanced the Christmas holiday break in order to give Campriello additional time to prepare. When trial resumed on December 21, the judge informed the jury that Christiansen was still too ill to proceed and introduced Campriello to the jurors. The government then called its next witness, an undercover detective who had dealt with Bokun. The following day, Campriello cross-examined the undercover officer thoroughly and at length. Trial was then adjourned until after the holidays. Gov't C.A. Br. 94-95.

On January 4, 1988, trial reconvened with Campriello as counsel for Bokun. The next day and frequently thereafter, both Campriello and Christiansen appeared jointly for Bokun. They alternated cross-examining the government's witnesses, objecting to the government's questioning, making legal arguments, and presenting Bokun's defense case.

Both attorneys participated in the charging conference, and Campriello delivered the defense summation. Gov't C.A. Br. 95.

Both attorneys represented Bokun at sentencing. Following the imposition of sentence, Christiansen advised the court that Bokun wished to be represented by Campriello on appeal. The court granted Christiansen's request to withdraw, but advised Bokun that if he decided to be represented by Campriello on appeal, he would have to forgo any challenge to his attorney's effectiveness. Bokun acknowledged the court's advice and reiterated his desire to be represented by Campriello. Gov't C.A. Br. 96.

Apparently recognizing (89-5512 Pet. 38) that Campriello was not ineffective under the standards set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984), petitioner nonetheless contends that there is a *per se* Sixth Amendment violation whenever counsel is substituted during a RICO trial. There is no merit to that claim. Absent "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," the Sixth Amendment guarantee of effective assistance of counsel is not implicated unless "some effect of [the] challenged conduct on the reliability of the trial process" is demonstrated in particularized fashion. *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). In the present case, no such effect can be shown. To the contrary, the trial court took great pains to ensure that the substitution of counsel did not prejudice petitioner. When petitioner's original counsel, Alfred Christiansen, became ill eight weeks into the trial, the court arranged, with petitioner's consent, for counsel for a co-defendant to represent petitioner during Christiansen's absence. The court took that step only after assuring itself that the proof would not implicate petitioner until the following week, when Christiansen was ex-

pected to return. Thereafter, the government rearranged its proof to avoid introducing any evidence that would implicate petitioner in Christiansen's absence. When it became apparent that Christiansen would be absent longer than originally anticipated, the court appointed Austin Campriello to represent petitioner as co-counsel, and the court advanced a holiday break in order to give Campriello time to prepare. Campriello reviewed the records in the case, familiarized himself with the trial proceedings to date, and announced that he was prepared to proceed. At no time did Campriello request any additional time in order to prepare for trial. There were only two days on which Campriello handled petitioner's representation by himself; after Christiansen reappeared at trial, he and Campriello frequently jointly appeared for petitioner. The record reflects, and the court of appeals specifically found (Pet. App. 11a), that Campriello represented petitioner effectively. Indeed, petitioner's decision to have Campriello represent him on appeal confirms that he regarded Campriello as an effective advocate for him.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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